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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARCUS S. MINIX,

Petitioners,

vs.

COMMONWEALTH OF KENTUCKY;
KENTUCKY SUPREME COURT;
STEPHEN N. FRAZIER, JUDGE,
JOHNSON CIRCUIT COURT; AND
SHERRY MINIX WOLF,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Regional Administration Program Charter promulgated by the Supreme Court of Kentucky as a public law is violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States (on its face or as applied,) because it is a body of law that has not been published, and moreover, it is counter to express language of the Kentucky Constitution set forth in Section 110(5)(b).

2. Whether a state court may refuse to consider state and federal constitutional issues properly raised.

3. Whether a state may continue the deprivation of parental custodial rights on the pretext of the "best interests of the children" without restitution of that parent to his status and position status quo ante, subsequent to a judicial determination that his custodial rights were terminated by void court orders entered and perpetuated for approximately six years.

4. Whether a state court may ignore or disregard federal bankruptcy stay of state court domestic relations proceedings, including but not limited to custody and visitation matters, based upon the pretext of the "best interests of the children", without termination of the automatic stay that arose under Federal Bankruptcy Code Section 362(a), except for the exceptions set forth in 362 (b) (2).

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Marcus S. Minix ("Minix",) petitions for a writ of certiorari to review the opinion of the Supreme Court of the Commonwealth of Kentucky in this matter.

OPINIONS BELOW

The Order of mandamus by the Kentucky Court of Appeals dated January 19, 1995, and the Court of Appeals' Order dated March 23, 1995 which made the mandamus final and appealable, are reproduced herein in Appendix A and Appendix B, respectively. The Supreme Court of Kentucky's Memorandum Opinion Affirming dated August 24, 1995, which was made final by the said Court's Order dated November 22, 1995 denying Minix's petition for a rehearing, are reproduced herein in Appendix C and Appendix D, respectively. Neither the Kentucky Court of Appeals Order nor the Kentucky Supreme Court Opinion is reported.

It is the denial of relief in the Kentucky Court of Appeals' Order, as the same was affirmed by the Supreme Court of Kentucky, for which review is sought.

JURISDICTION

The Order of mandamus by the Kentucky Court of Appeals dated January 19, 1995, granted to Minix only a part of the relief which he had requested. App. A. This Court of Appeals' Order dated March 23, 1995 refused to grant the Petitioner a rehearing. App. B The Supreme Court of Kentucky Memorandum Opinion dated August 24, 1995 affirmed the refusal to grant relief (App. C,) and the Kentucky Supreme Court denied a Rehearing to Minix by its Order dated November 22, 1995. App. D. This Court has jurisdiction under 28 U.S.C. Sec. 1257, 28 U.S.C. Sec. 2104, and 28 U.S.C. Sec. 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U.S. Constitution limits the

judicial power of the federal courts to all "cases" and "controversies."

28 U.S.C. Sec. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be has as may be just under the circumstances.

28 U.S.C. Sec. 2104 provides:

> An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States.

28 U.S.C. Sec. 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute or any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The People of Kentucky amended Sections 109 through 139, 141 and 143 of the Kentucky Constitution by the Constitutional Judicial Article effective January 1, 1976 ("Article'').
Under amended Section 110(5)(b), the People assigned two functions to the Kentucky Supreme Court Justice: (1) submitting the budget of the judiciary; and (2) assigning special judges. The full text of Section 110(5)(b) is as follows:

> **"He [Chief Justice] shall assign temporarily any Justice or Judge of the Commonwealth, active or retired, to sit in any Court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes. The Chief Justice shall submit the budget for the Court of Justice and perform all other necessary administrative functions relating to the court."**

Kentucky Constitution Section 110(5)(b).

Subsequent to the Article, the Kentucky Legislature enacted two enabling statutes of amended Section 110(5)(b):

> **"When, from any cause, a judge of any circuit or district court... cannot properly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit or district judge, the circuit clerk shall at once certify the facts to the chief justice who shall immediately designate a regular or retired justice or judge of the Court of Justice as special judge [emphasis added]";**

KRS 26A.020(1) effective March 19, 1977 and,

> **"Any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the chief justice [emphasis added].**

KRS 26A.015(3)(a), effective date 7-1-82.

Upon a need of a special judge in the a Kentucky circuit or district court, it is the constitutional duty of the circuit clerk to refer the assignment to the Chief Justice.

Eight months later, and in contradiction to the Kentucky constitutional mandate, Kentucky Supreme Court Chief Justice John Palmore under his own, unilateral order adopted the first "Charter" on December 5, 1977. "Regional Administration Pilot Project" (Dec. 5, 1977). On December 3, 1983, the Charter was revised by Order of Kentucky Supreme Court Chief Justice Robert Stevens. "Order Adopting Regional Administration Program Charter" (Feb. 3, 1983). Through the "Charters", the clerk does not refer assignments to the Chief Justice, but to regional administrators appointed by the Chief Justice.

In 1983, Respondent Judge Frazier was appointed chief regional circuit judge of the Mountain Region of Kentucky Circuits. Under the 1983 "Charter" at IV.5., a chief regional judge is "expressly prohibited" assigning judges to a proceeding from which he is disqualified; that duty falls upon the vice chief regional judge who is also appointed by the Chief Justice. Id.

In 1986, Petitioner Marcus S. Minix ("Minix") filed for divorce in Johnson Circuit Court, and Judge Frazier initially presided over the case. He subsequently disqualified because of a personal bias he had in favor of Minix's former spouse, Sherry Minix (now Wolf, hereafter "Wolf"), and the case was then assigned to Judge James A. Knight. Judge Knight in 1988 granted dissolution of

marriage, and joint custody of the parties' two children, now ages 10 and 13, with alternating weekly physical custody for the sake of continuity and stability, in Paintsville, Kentucky. In addition, Judge Knight ordered Minix to pay for all of the children's needs as child support, and to pay for and furnish a rental house for Minix' and Wolf's use when they were not performing alternate weekly physical custody in Minix' home, that was his premarital asset.

Subsequently, two-and-one-half (2 1/2) years after divorce petition and three (3) months after dissolution of marriage, Minix filed bankruptcy petition No. 88-0149 in the Eastern District of the U.S. Bankruptcy Court at Pikeville, Kentucky. Appendix E, "Order" of the U.S. Bankruptcy Court (Aug. 7, 1991). Two weeks later, Minix gave actual notice of bankruptcy in the divorce proceeding to Sherry Minix Wolf, her attorneys, and the Johnson Circuit Court.

Respondent Sherry Minix and her attorneys have never been granted relief from the bankruptcy automatic stay, 11 U.S.C. 362, or have they ever requested the case's removal from bankruptcy court's exclusive and original jurisdiction under 28 U.S.C. Section 1334. However, six months after the filing of the bankruptcy petition, in violation of 11 U.S.C. Section 362(a) and (b)(2), Judge Knight sustained Sherry Minix' motion for $1,100.00 per month child support.

Judge Knight later voluntarily disqualified in January, 1989. Upon the disqualification of both judges, Judge Frazier reassigned himself as special judge to the case.

In spite of the bankruptcy stay, Judge Frazier on May 18, 1990 modified the pre-bankruptcy petition orders of Judge Knight, and granted sole custody of the children to Sherry Minix, and validated their relocation away from their homeplace of Johnson County, Kentucky, to Ashland, Boyd County, Kentucky, which occurred in violation of standing court orders. In addition, Judge Frazier awarded a property settlement based on a division of assets that were already the property of the bankruptcy trustee, under 11 U.S.C. Section 541. With no alternative, Minix filed an adversarial proceeding against Judge Frazier,

Wolf, and her attorneys, for willful violation of the automatic stay. This case remains now pending before the U.S. Court of Appeals for the Sixth Circuit, Case No. 95-6220, styled *M. Stephen Minix v. Sherry Minix and the Firm of Francis, Kazee and Francis.*

The participation of U.S. Bankruptcy Judge William S. Howard, who was a previous attorney in this proceeding for Sherry Minix Wolf, is pending appeal in the Sixth Circuit in Case No. 94-6140, *M. Stephen Minix v. J. James Rogan, Trustee; Family Federal Savings and Loan Association; Citizens National Bank; and Sherry Minix.* Subsequent to Judge Howard's disqualification, U.S. Bankruptcy Judge Joe Lee by order of August 7, 1991 held that, "The orders of the Johnson Circuit Court [May 18, 1990 by Respondent Judge Frazier] providing for division of the marital property of the parties which were entered after the intervention of bankruptcy and prior to obtaining relief from stay are void under Federal and Kentucky law." *Raikes v. Langford*, 701 S.W.2d 142 (Ky.Ct.App.1986) and *In re White*, 851 F.2d 170 (6th Cir. 1988). This order was not appealed and is therefore the law of the case.

Judge Frazier disqualified a second time in the state court action. Then under the Charter acted as Chief Regional Judge to appoint Judge Kelley Asbury of Ashland, Boyd County, Kentucky, as his own replacement to the case. The Petitioner discovered from a staff attorney for the Kentucky Administrative Office of the Courts, that a regional administrative judge, subsequent to disqualification from a case, is "expressly prohibited" from appointing a special judge, including himself to the same case. No published law, however, could be found to substantiate this. Minix went to the Kentucky Supreme Court Clerk, but was unable to get a copy of the Charter because orders of the Kentucky Supreme Court are filed by date, and are not published. Minix went back to the Administrative Office of the Courts and was told the date of the Charter. Minix then returned to the Supreme Court Clerk's office and was finally able to purchase a copy of the unpromulgated Charter.

After Special Judge Asbury recused from the case because of a conflict with Minix' current counsel, the case again came under Judge Frazier's jurisdiction for assignment of a special judge.

Minix protested to Frazier that he was not qualified to appoint, but Judge Frazier took no action to forward the case to Justice Stephens per the requirements of Kentucky Constitution 110(5)(b).

Consequently, Minix filed, pro se, his "Petition for Writ of Mandamus" in the Kentucky Court of Appeals against Judge Frazier. The Court of Appeals in an Order dated January 25, 1995, voided all orders and special judge appointments of Judge Frazier since his first disqualification six years earlier. App. A The Court, however, refused to address Minix' federal statutory and constitutional issues which he had raised in this original action, of the violations perpetrated against him by the unpromulgated Charter, per the Fourteenth Amendment of the United States Constitution, and the orders rendered subsequent to the bankruptcy stay.

Sherry Minix Wolf appealed to the Kentucky Supreme Court, and Minix cross-appealed on the constitutional and federal issues. The Kentucky Supreme Court declined to decide any of them, as either moot or irrelevant.

On December 5, 1994, Kentucky Supreme Court Chief Justice Robert Stephens appointed Circuit Judge Charles E. Lowe, Jr., of Pikeville, Kentucky, as special judge of the Johnson Circuit Court over this case. Judge Lowe was directed by the Court of Appeals order to void all of Judge Frazier's orders, which he did; however, immediately thereafter, Judge Lowe effectively reinstituted the same void orders.

For these reasons, Minix submits his Petition for a Writ of Certiorari from the denial of the Kentucky Court of Appeals and the Kentucky Supreme Court to address the federal statutory and constitutional issues presented by Minix.

REASONS FOR GRANTING THE WRIT

1. The Constitutional and Federal Questions Were Presented But Unaddressed By The Kentucky Supreme Court

Petitioner claimed in his original Kentucky Court of Appeals action abrogation of various rights, privileges and immunizes under the federal constitution, 28 U.S.C. Section 1257(3), and 28 U.S.C. Section 2103. Petitioner attempted to challenge the validity of the "Regional Administration Program Charter" as repugnant to the U.S. Constitution on the basis of lack of minimum due process safeguards for the want of promulgation and formal notice, because of the union of executive and judicial functions, and finally for no involvement of the Chief Justice in spite of the Kentucky Constitution's requirement. In view of the public importance of the questions presented, jurisdiction is vested in this Court. 28 U.S.C. Section 1257(2); *Raley v. State of Ohio*, 79 S.Ct. 1257, 1265 (1959). Petitioner requested that the Kentucky Supreme Court issue a statement that federal Constitution issues were properly raised but not addressed; however, the Kentucky Supreme Court held that "In view of our decision in this matter, we decline to decide any of these issues because they are either moot or irrelevant." There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. Raley at 1265; See: 34 S.Ct. 874.

Petitioner Minix argued and demonstrated to the Kentucky Supreme Court that he was personally injured by the lack of state's due process safeguards caused by this Court's failure to: (1) promulgate the Charter; (2) implement by regulation KRS 26A.015 (3)(a) and KRS 26A.020 (1); and (3) to observe the plain language of the duties bestowed on the Chief Justice under Kentucky Constitution Section 11O(5)(b).

Petitioner Minix also presented the Kentucky Supreme Court with the argument that is was required to consider his constitutional-based complaints.

In addition to not addressing Minix' federal constitutional claims of deprivations created by the due process violations of the unpublished Regional Administration Charter, Minix asserted that the state courts had failed to observe federal preemption because of his pending bankruptcy. The Kentucky Supreme Court failed to consider or address any of these issues.

The Kentucky Court of Appeals and Supreme Court were the appropriate original forums to raise issue as to the validity and due process failings of the Charter. Ky.Const.Sect. 110(2)(a); Ex *Parte Farley*, Ky., 570 S.W.2d 617, 621 (1978); *Ex Parte Auditor of Public Accounts*, Ky., 609 S.W.2d 682, 683 (1980). The Kentucky Supreme Court had a duty to determine if the Charter passes constitutional muster, but it refused to do so.

Minix also argued to the Kentucky Supreme Court that its regional administrative rules for judicial circuits under Section 112(4) cannot repeal the constitutional function of the Chief Justice assigned by the citizens of Kentucky under Section 110(5)(b) without constitutional amendment, and exist in conflict with KRS 26A.020(1) and KRS 26A.015(3). As a due process safeguard, the people through Ky.Const.Sec. 110(5) (b) have assigned to *only* the Chief Justice the constitutional function of assigning a judge "to sit in any court other than the Supreme Court...for the prompt disposition of causes".

The Kentucky Supreme Court, however, refused to address, much less correct, the constitutional questions concerning the Charter.

Because Minix' case demonstrates that provisions of the unpublished Charter are unconstitutional, conflict with statutory law, and do not afford fundamental due process safeguards against secret and unpromulgated laws, it is appropriate for this Court to now review them.

2. Unpublished Kentucky Supreme Court Chief Justice Order Entitled "Regional Administrator Program Charter" Purporting To Delegate Kentucky Constitional Function Of Assigning Special Judges To Regional Judges Violates The Due Process And The Equal Protection Clauses Of The Fourteenth Amendment.

Kentucky's Regional Administration Charter is an unpromulgated set of court rules that lacks any formal notice to the public, Kentucky Bar, or even the judiciary. It also provides for no right of a meaningful hearing or judicial review and, consequently, is deficient in the minimum safeguards that are required by the United States Constitution under the Fourteenth Amendment. It is clear that the Kentucky Constitution calls for a procedural safeguard, that if were implemented by the Kentucky Supreme Court, would alleviate the defects now existing. *Ky.Const.Sect. 110.*

A. Non-promulgation

Petitioner Minix challenged without success the Charter's lack of promulgation and formal notice safeguards to the Kentucky Supreme Court. Petitioner argued that without promulgation and formal publication, the citizens of this state will continue to have no notice of the Charter's provisions, particularly the judicial disqualification provision at IV.5.. The consequences of this are made apparent by the case at bar.

The Kentucky Supreme Court ignored Petitioner's citation to them many cases rendered by this Court which have held that actual notice was a primary element of due process. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Joint Anti-Fascist Refugee Comm. v. McGarth*, 341 U.S. 123, 171-72 (1951); *Marks v. United States*, 430 U.S. 188 (1977). See also *21 C.J.S. Courts* Section 128, p. 149.

Judge Frazier's exercise of authority under the secret Charter

led to the indefensible sort of deprivation and wrong by the State that the Fourteenth Amendment was meant to prohibit. Should this Court opine that minimum due process safeguards require promulgation and formal publication will provide the opportunity for a persons in the future to avoid the deprivation Petitioner experienced; and will remove the temptation for a judge to act arbitrarily and without fear of a hearing or review. If this Court strikes the Regional Administration Charter as unconstitutional, and requires the Kentucky Supreme Court to follow the U.S. and Kentucky Constitutions, it will prevent future injustice, and promote confidence in the Kentucky judicial process.

Consequently, Petitioner requests this Court to grant to him a writ and then to determine if the Kentucky Regional Administration Charter, in general, and its procedures for the assignment of a special judge in particular, are violative of the Fourteenth Amendment of the U.S. Constitution.

B. Charter disables the People's safeguard.

Petitioner made a proper challenge below that the Charter was repugnant to the due process safeguards adopted by the People through Kentucky Constitution Sec. 110(5)(b), and by the state legislature through KRS 26A.020(1) and KRS 26A.015(3)(a). Since the Kentucky Supreme Court chose to ignore the problem when presented, it is appropriate for a writ to be granted to determine the common and ordinary meaning of the "intelligible" words of Kentucky Constitution Section 110(5)(b) that states: "He [the Chief Justice] shall assign temporarily any Justice or Judge of the Commonwealth, active or retired, to sit in any Court other than the Supreme Court..." Under Kentucky law, the word "shall" as used in this phrase is a word meaning "mandatory". KRS 446.010(29); *Perkins v. Commonwealth*, Ky., 305 S.W.2d 935 at 937 (1957).

Likewise, the phrase, "when he [the Chief Justice] deems such assignment necessary for the prompt disposition of causes" is also plainly intelligible. It obviously means that it is only within the Chief Justice' discretion whether to excuse a judge from a case.

Because the Kentucky Constitution vests the Chief Justice as the "executive head of the Court of Justice", Ky.Const. Sect. 110(5)(b), it is the Chief Justice to whom all judges must report to be excused and assigned, after notice to the parties. There are no constitutional or statutory constraints imposed upon a regional administrator created by the Chief Justice. In order that the Chief Justice "deem[s] such assignment necessary", he must review affidavits of disqualification filed by a party with the clerk under KRS 26A.020(1) or a judge's reason to be excused to determine the risk of injustice by at least one of the following: (1) the sitting judge's duty to sit; (2) the "integrity and independence of the judiciary" under SCR 4.300, Canon 1; (3) the "appearance of impropriety" under SCR 4.300, Canon 2; and (4) the appearance of "impartiality" under SCR 4.300 Canon 3.

The Kentucky Supreme Court recognized the statute KRS 26A.015(3)(a) in regard to the Chief Justice's function to appoint a special Justice to the Kentucky Supreme Court in *Ky. Utilities v. South East Coal*, Ky., 836 S.W.2d 407 (1992). KRS 26A.015(3)(a) is intended to supplement Section 110(5)(b) in regard to assigning special judges to the District and Circuit Courts. The Kentucky Supreme Court in *Ex parte Auditor of Public Accounts*, Ky., 609 S.W.2d 682 at 685 (1980), held that the function of the Chief Justice in Section 110(5)(b) to submit the budget was unmistakably clear. Petitioner argues that the function of the Chief Justice to assign special judges is also "unmistakably clear".

3. Kentucky Supreme Court Erred In Refusing To Consider And Rule On Petitioner's 14th Amendement Constitutional Arguments

The granting of a writ of certiorari will afford this Court to rectify as well as to prevent the future reoccurrence of the egregious denial of due process suffered by the Petitioner by six years of void orders entered by Judge Frazier, without jurisdiction. Subsequent to his self-reappointment, Judge Frazier modified the valid orders of joint and physical child custody entered by Judge Knight to sole custody and relocation of the children in favor of Respondent Sherry Minix Wolf, the party that

caused Judge Frazier to disqualify because of his personal bias in favor of. This constituted violation of Petitioner's 14th Amendment Constitutional rights and violation of Kentucky statutes KRS 403.270 and KRS 403.340, which mandate equal consideration shall be given to both parties in determining the "best interest of the children". See, e.g., *Squires v. Squires*, Ky., 854 S.W.2d 765
(1993).

Petitioner was not granted his 14th Amendment right to be heard on the void child custody modification of the previous valid joint and physical custody orders. Because the judgment was void, Petitioner must not lose any previously held rights, and likewise, Respondent Sherry Wolf must not obtain advantages not previously enjoyed, just because of void orders rendered in her favor pursuant to secret Kentucky laws. Petitioner claimed below without success that he had the right to be heard de novo on child custody modification based on this Court's ruling in *Ward v. Village of Monroeville, Ohio*, 93 S.Ct. 80 (1972) (Writ of Certiorari granted on denial of state to provide a disinterested and impartial judicial officer as guaranteed by the Due Process cause of the Fourteenth Amendment and remanded for a fair and impartial trial in the first instance).

Petitioner continues to seek an impartial adjudication ab initio from the perspective of the last valid orders entered in the case. The Kentucky Supreme Court refused to consider this Court's holding in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 71 L.Ed.2d 265, 279, 102 S.Ct 1148 (1982), where this Court held that the 14th Amendment requires an opportunity granted at a "meaningful time" and in a "meaningful manner" for a hearing "appropriate to the nature of the case".

If this Court accepts review, it will have the opportunity to determine that the unpromulgated Kentucky Regional Administration Charter does not give the opportunity for a hearing or appeal in a "meaningful time" and "meaningful manner". "It is well settled that a parent has a liberty interest in the custody of his children which cannot be terminated without a compliance with the requirements of due

process." *Hooks v. Hooks*, 771 F.2d 935 (6th Cir. 1985) Petitioner was wrongfully deprived of the joint and physical custody of his two children without due process by failure of the Kentucky Courts to direct that any further proceedings be based on Judge Knight's valid orders of joint physical custody.

This Court's ruling in *Lassiter v. Department of Social Services*, 452 U.S. 18 at 27, 101 S.Ct. 2153 at 2160, 68 L.Ed.2d 640 (1981) that a natural parent's desire for and right to the companionship, care, custody and management of his or her children is an interest far more precious than any property right, was entirely ignored by the Kentucky Supreme Court. Cf., *Little v. Streamer*, 452 U.S. 1, 13, 101 S.Ct. 2202, 2209, 68 L.Ed.2d 627 (1981)

The Opinion of the Kentucky Supreme Court and the Kentucky Court of Appeals' Order were deficient absent their granting Petitioner's 14th Amendment claim of to be heard based from a position of the last valid orders. Since the Petitioner asserted his 14th Amendment claim but it was not granted, this Court has held that Petitioner has the right to be heard in this Court. See, e.g., *Raley v. Ohio*, 360, U.S. 423, 436, 79 S.Ct. 1257, 1265, 3 L.Ed.2d 1344 (1959) (this Court granted Writ of Certiorari urging that the Ohio Supreme Court erred in holding that Plaintiff had not established his Fourteenth Amendment claim.)

In *Ward*, Mr. Justice Brennan stated that the "Petitioner is entitled to a neutral and detached judge in the first instance." Id. at 84. In the present case, Petitioner was not granted an impartial modification in the first instance although specifically requesting "a neutral and detached judge in the first instance" on the modification issues.

Petitioner requests this Court accept this case in order to give to him the opportunity to be heard before an impartial judge for the first time on his custody claims.

4. State Court Cannot Refuse To Recognize Federal Jurisdiction Preemption Upon Bankruptcy Intervention In Domestic Relations Proceeding.

Petitioner Minix determined bankruptcy protection was necessary due to his marital debt remaining, so that he could comply with validly entered orders requiring him to pay for a rental house, his premarital residence, and to support Respondent Sherry Minix, himself, and their two children. The automatic stay, 11 U.S.C. Section 362(a), "...operates as a stay, applicable to all entities of (1) the commencement or continuation...of a judicial...proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; ...(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;..."

The domestic relations exemption, *11 U.S.C. Section 362(b)(2)* specifies that "The filing of a petition...does not operate as a stay...of the collection of alimony, maintenance, or support from property that is not property of the estate." [emphasis added]. The court in *Amonte v. Amonte*, 461 N.E.2d 826 (1984) defined the term "collection" in 362(2)(b) as "proceedings that have culminated in the entry of a final judgment or order for alimony, maintenance, or support prior to the filing of a petition." Id. at 830. The court in *In Re Simpson*, 140 B.R. 857 (Bankrtcy.E.D.Pa. 1992) held, "In fact, all proceedings not within the scope of 11 U.S.C. Section 362(b) [exemptions] are stayed by 11 U.S.C. Section 362(a), including divorce and custody proceedings." Id. at 859; Cf., *In Re Pemberton*, 148 B.R. 415 (Bankr.E.D.Pa. 1992). The court in *Stringer v. Stringer*, 847 F.2d 549 (9th Cir. 1988) held that "The "precise wording of the stay and its exemptions should be emphasized" with exemptions read narrowly so that the debtor is provided with the relief that Congress intended." Id. at 552 (quoting *Collier on Bankruptcy* #362.04(1) at 362-63 (15th ed.
1988).

Clearly, counterclaims "against" a debtor of new entitlements to custody, child support, and property are not among the narrowly enumerated exemptions of *Section 362(b)(2)*, but are stayed by the broad scope of *11 U.S.C. Section 362(a)* pending bankruptcy examination and relief under 362(d). That makes sense because, upon bank

ruptcy petition, the State is provided continuing jurisdiction under *Section 362(b)(2)* to enforce "against" the Petitioner, as debtor, the valid custodial and support orders entered in his case prior to the bankruptcy petition pending examination and relief. Federal bankruptcy laws are supreme to state statutes. *Fix v. Automobile Club Inter-Insurance Exchange*, 413 S.W.2d 194 (Mo.App.1967); *Kesler v. Department of Public Safety*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641. Authority of bankruptcy law is given expressly to Congress from the U.S. Constitution. *U.S. Const., Art. I, Sect. 8, cl. 4.* Under the Supremacy Clause, "Judges in every State shall be bound thereby". *U.S. Const., Art. VI, Supremacy Clause.*

There was never a motion to remove this case from federal court to State court under *28 U.S.C. Section 1334*. The U.S. Bankruptcy Court properly exercised power, without appeal, by sua sponte voiding the orders below ab initio of the automatic stay. *11 U.S.C. Section 105(a)* (court not precluded from sua sponte action to prevent abuse of process; See *In Re Posner*, 700 F.2d 1243 (7th Cir.1983) (bankruptcy court properly exercised jurisdiction in voiding state court judgment). Orders voided by the bankruptcy court cannot be validated by subsequent proceedings. *Foremost Ins. Co. v. Whitaker*, Ky.App. 892 S.W.2d 607, 610 (1995). The Sixth Circuit applied bankruptcy law to the domestic relations proceeding in *In re White*, 851 F. 2d 170 (6th Cir. 1988) as follows:

> "The jurisdiction granted in 28 U.S.C. Section 1334(d) indicates a conscious effort by Congress to grant the bankruptcy court special jurisdiction and to preclude the type of jurisdictional disputes evidenced in those cases. [Citations omitted]." Id. at 172-173. "The provisions for lifting the stay found in Section 362(d) should be deemed to apply in these circumstances for the limited purpose of allowing the state court to exercise its exclusive domestic relations authority...". Id., at 174.
>
> "Lifting the automatic stay asprovided in 11 U.S.C.

> 26 Section 362(d) in this case will permit the state court to exercise limited jurisdiction in the kind of matter that is traditionally exclusively reserved for state divorce courts. Bankruptcy courts in other cases have not declined to lift the stay to allow divorce proceedings to conclude." Id. at 173.
>
> "We affirm the decision to lift the stay...but we do not wish to establish a per se rule in every bankruptcy case involving a domestic relations situation that the bankruptcy stay must be lifted. For example, there might be times when the bankruptcy court suspects collusion between the spouses to stage a divorce to avoid payment of just claims of creditors, and granting a stay in that situation would obviously not serve the ends of bankruptcy or divorce jurisprudence. We simply hold that whether or not to lift the automatic stay in that type of bankruptcy proceeding lies within the reasonable discretion of the bankruptcy court or the district court as the case may be." Id. 174.

The U.S. Bankruptcy Court order of Judge Joe Lee specifically cited *Raikes v. Langford*, supra, where the Kentucky Court of Appeals ruled that subsequent to invocation of the bankruptcy automatic stay: "Any such exercise of jurisdiction is void and of no effect". *Raikes v. Langford*, 701 S.W.2d at 144; See same holding by Sixth Circuit in *In Re Smith*, 876 F.2d 524 (6th Cir. 1989).

Petitioner requests this Court, therefore to accept his petition for a writ of certiorari so that it may consider the federal preemption's effect on the State court's orders that were entered against the Petitioner and his bankruptcy estate post-bankruptcy petition, without a lifting of the stay.

CONCLUSION

For the reasons stated above, separately and collectively, Petitioner's Petition for a writ of certiorari to the United States Supreme Court should be granted, so that it may determine the validity of the Kentucky Supreme Court's unpromulgated and unpublished Regional Administration Charter per requirements of the 14th Amendment of the United States Constitution; to determine the federal questions presented by acts of Commonwealth of Kentucky state courts in its proceedings conducted in disregard to the Petitioner, as a debtor in bankruptcy, and his bankruptcy estate post-bankruptcy petition; and to consider whether the reinstatement of the voided court orders effectively deprived the Petitioner of his custody and possession rights to his children without a meaningful hearing after restitution and return of circumstances to the status quo ante, contrary to the 14th Amendment Due Process and Equal Protection rights of the United States Constitution.

Respectfully submitted,

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 94-CA-2820-OA

MARCUS S. MINIX *Petitioner*

ORIGINAL ACTION IN COURT OF APPEALS
V. REGARDING JOHNSON CIRCUIT COURT

STEPHEN N. FRAZIER, JUDGE,
JOHNSON CIRCUIT COURT *Respondent*

ORDER GRANTING CR 76.36 RELIEF IN PART

BEFORE: LESTER, CHIEF JUDGE; DYCHE, AND MCDONALD, JUDGES.

The Court has considered petitioner's petition for writ of mandamus and respondent's response thereto and, being sufficiently advised, ORDERS the petition be GRANTED IN PART.

Petitioner requests this Court, *interalia*, to find that all orders and judgments entered by respondent in *Marcus S. Minix v. Sherry Minix*, action number 86-CI-000010, subsequent to his first voluntary disqualification on September 18, 1987, are void. Petitioner contends that, since respondent had previously disqualified himself from this case, he had lost jurisdiction and could not later resume participation in the same case. Petitioner further requests that this Court direct respondent to refer the matter to the Chief Justice for the appointment of a Special Judge. Petitioner cites, as authority for the relief he seeks, KRS 26A.015; SCR 4.300; *Wade v. Bondurant*, Ky., 625 S.W.2d 847 (1981)

and *Weddington v. Lair*, Ky., 404 S.W.2d 451 (1966). He claims that, due to respondent's failure to refer the matter to the Chief Justice, he cannot get relief from Sherry Minix's denial of visitation.

Initially, we note that the second prong of the relief sought by petitioner is moot. Respondent referred the matter to the Chief Justice and the Chief Justice appointed a Special Judge, The Honorable Charles E. Lowe, Jr., by order entered December 5, 1994.

However, we are of the opinion that petitioner's argument that respondent lost jurisdiction over the action below when he disqualified himself has merit.

Petitioners dissolution proceedings were first assigned to respondent, Johnson Circuit Court, Division I. Subsequently, respondent disqualified himself and transferred the matter to Judge James A. Knight, Johnson Circuit Court, Division II. Judge Knight later recused himself. Respondent, then acting as Chief Regional Circuit Judge, attempted to assign a replacement but, apparently, was unable to do so and resumed participation in the case.

We agree with petitioner that a judge, once voluntarily disqualifying himself from a matter loses jurisdiction forever in the absence of an agreement of the parties, that he has no right to reassume jurisdiction and that any order entered by that judge, upon resuming participation in the case, is a nullity. ***See Wade, supra.,*** at 847; ***Weddington, supra.,*** at 452-53. Consequently, The Honorable Charles E. Lowe, Jr., Special Judge, is hereby DIRECTED to enter an order VACATING all orders and judgments entered by respondent in action 86-CI-000010 subsequent to respondents first voluntary disqualification from that case.

The Clerk of the Court of Appeals is DIRECTED to mail a copy of this order to The Honorable Charles E. Lowe, Jr., Judge of the Thirty-Fifth Judicial Circuit, Division II.

ENTERED: January 19, 1995

Charles B. Lester
CHIEF JUDGE, COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 94-CA-2820-0A

MARCUS S. MINIX *Petitioner*

V. ORIGINAL ACTION IN COURT OF APPEALS
REGARDING JOHNSON CIRCUIT COURT

STEPHEN N. FRAZIER, JUDGE
JOHNSON CIRCUIT COURT *Respondent*

AND
SHERRY MINIX REAL PARTY IN INTEREST[1]

ORDER

BEFORE: LESTER, CHIEF JUDGE; GARDNER,
AND MCDONALD, JUDGES

The Court has considered the motion of the real party in interest for reconsideration, petitioner's motions to dismiss and to strike the motion for reconsideration, and petitioner's motion for sanctions. The Court, being sufficiently advised, ORDERS all four (4) motions be DENIED.

Further, the Court has considered petitioner's motion for an order and ORDERS the motion be GRANTED IN PART. Pursuant to CR 76.38(1), this Court's order entered January 19, 1995 became effective on that date.

ENTERED: March 23, 1995

/s/ Charles B. Lester
CHIEF JUDGE, COURT OF APPEALS

RENDERED: AUGUST 24, 1995
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
95-SC-178-MR AND 95-SC-195-MR

STEPHEN N. FRAZIER, JUDGE
JOHNSON CIRCUIT COURT AND

Appellants/Cross Appellees

SHERRY MINIX
REAL PARTY IN INTEREST

APPEAL FROM COURT OF APPEALS
V. 94-CA-2820-01

MARCUS S. MINIX

Respondent/Cross Petitioner

MEMORANDUM OPINION OF THE COURT AFFIRMING

This appeal is from an order of the Court of Appeals which granted in part the petition of Marcus S. Minix for a writ of mandamus and directed Special Judge Charles E. Lowe, Jr., to vacate all orders and judgments entered by Judge Stephen N. Frazier after his first voluntary disqualification from the case.

The issue we face as a reviewing court is whether the refusal of Judge Frazier and his later resumption of the bench was improper so as to require his orders to be found void.

This Court affirms the decision of the Court of Appeals because once

a judge has voluntarily disqualified himself from a matter, that judge loses the authority to actively participate in the absence of an agreement of the parties, and he has no authority to resume active participation or to enter any order in the case. Any order entered by the judge who attempts to resume active participation of the case is a nullity. *Wade v. Bondurant,* Ky., 625 S.W.2d 847 (1981); *Wedding v. Lair,* Ky., 404 S.W.2d 451 (1966).

In this case, there was no waiver agreement in writing in regard to the actions of Judge Frazier after his original disqualification. Waiver cannot be presumed from silence. It must be in writing or otherwise memorialized in the record. *Small v. Commonwealth,* Ky.App., 617 S.W.2d 61 (1981). We do not accept the argument that Marcus Minix through his actions agreed to the resumption of the bench by Judge Frazier.

Once Judge Frazier voluntarily refused himself, he was expressly prohibited from exercising the power of Chief Regional Circuit Judge to appoint any special judge, including himself, to hear the case. Charter §IV.5. Such authority passed to the Vice-Chief Regional Circuit Judge. The procedure provided for in the Charter was not followed. As noted by Judge Johnstone in his concurring opinion, the Charter provides in pertinent part that it is the duty of the Vice-Chief Regional Circuit Judge to exercise the assignment authority whenever the Chief Regional Circuit Judge disqualifies himself.

This dissolution of marriage proceeding filed in 1986 was first assigned to Judge Frazier who then disqualified himself and transferred the matter to Judge James A. Knight of the Johnson Circuit Court. Judge Knight later refused himself. Judge Frazier, then acting as Chief Regional Judge, attempted to assign a replacement judge but was unable to do so, and then resumed his own participation in the case.

In 1991, Judge Frazier assigned the case to Judge Asbury. In 1994, Judge Asbury disqualified himself, and on December 13, 1994, the Chief Justice appointed Special Judge Lowe. The case has also found its way to the Supreme Court on several occasions and review was

denied on grounds other than are presented at this time. The original request of Marcus S. Minix for an appointment by the Chief Justice, pursuant to KRS 26A.015, is now moot by virtue of the order entered December 5, 1994 appointing Special Judge Lowe.

This Court has considered the various arguments put forward by the parties in this case. The husband originally challenged the constitutionality of the administration charter providing for the regional judge system as unconstitutional. The husband also requested this Court to certify various federal constitutional questions.

The wife argues that the husband failed to object to the resumption of the bench by Judge Frazier and should not be heard on this issue now. She also petitions this Court to reverse the judgment of the Court of Appeals and hold that all orders entered by Judge Frazier and Judge Asbury be enforced.

In view of our decision in this matter, we decline to decide any of these issues because they are either moot or irrelevant. Pursuant to separate orders of this Court, we have granted the motion to supplement the record and deny the motion to dismiss.

It is the holding of this Court that once a judge voluntarily disqualifies himself from a matter, he loses authority to actively participate for all purposes and that the judge has no right to attempt to resume active participation. Any order entered by that judge upon attempting to resume participation in the case is a nullity. The order of the Court of Appeals granting in part a writ of mandamus pursuant to CR 76.36 is affirmed.

Stephens, C.J., and Fuqua, Lambert, Leibson, Reynolds and Wintersheimer, JJ., concur. Stumbo, JJ., not sitting.

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SUPREME COURT OF KENTUCKY
95-SC-178-MR AND 95-SC-195-MR

STEPHEN N. FRAZIER, JUDGE
JOHNSON CIRCUIT COURT AND

SHERRY MINIX
REAL PARTY IN INTEREST

Appellants/Cross Appellees

APPEAL FROM COURT OF APPEALS
V. 94-CA-1820-OA

MARCUS S. MINIX

Respondent/CROSS Petitioner

ORDER

The petition for rehearing is denied.

All concur, except Stumbo, J., not sitting.

ENTERED: November 22, 1995.

Robert F. Stephens
CHIEF JUSTICE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

IN RE:

M. STEPHEN MINIX CASE NO. 88-00149

DEBTOR

ORDER

This case was heard by the Court on June 20, 1991 on the objection of Sherry Minix, the former spouse of the debtor, to an amendment to schedules filed herein by the debtor on March 13, 1991. In the amendment to the schedules to his petition for relief under chapter 7 of the Bankruptcy Code the debtor lists as an asset a Kawai baby grand piano valued at $4,300.00. The objecting spouse claims the piano was awarded to her by terms of a marriage dissolution decree entered by the Johnson Circuit Court on May 18, 1990 approving the Recommended Supplemental Findings of Fact, Conclusions of Law, and Decree of the Domestic Relations Commission of that court entered February 15, 1990.

The debtor herein filed civil action no. 86-CI-010 in the Johnson Circuit Court in August 1986 seeking dissolution of his marriage to Sherry Minix. A decree of dissolution of marriage was entered on February 1, 1988, reserving all other issues, including division of marital property.

The debtor filed a petitioner for relief under chapter 7 of the Bankruptcy Code in this Court on May 4, 1988.

Neither the debtor nor the respondent, Sherry Minix, ever requested relief from stay for the purpose of permitting the Johnson

Circuit Court to adjudicate the rights of the parties in marital property.

The Johnson Circuit Court acquired in rem jurisdiction over the marital property when the marriage dissolution proceeding was filed. However, when bankruptcy intervene prior to any determination of the rights of the parties in the property, the husband's interest in the marital property became property of his estate subject to the jurisdiction of the bankruptcy court. *In re White*, 851 F.2d 170 (6th Cir. 1988).

The debtor's interest in all real and personal property became property of the bankruptcy estate to be administered by the trustee under the supervision of the bankruptcy court.

By various orders the bankruptcy court has relinquished jurisdiction over some of the property of the debtor but not over the baby grand piano which was not listed as an asset until March 13, 1991. The trustee has timely objected to any exemption the debtor may claim in the piano.

The orders of the Johnson Circuit Court providing for division of the marital property of the parties which were entered after the intervention of bankruptcy and prior to obtaining relief from stay are void under Federal and Kentucky law. *Raikes v. Langford*, 701 S.W.2d 142 (Ky. Ct. App. 1986). Accordingly, Sherry Minix does not have any claim to the baby grand piano based on those orders her claim to the baby grand piano does not take precedence over the claim of the trustee in behalf of creditors to the piano in this case.

Procedurally, the debtor or Sherry Minix or both should request relief from stay for the purpose of permitting the Johnson Circuit Court to fix the rights of the parties in such marital property as remains undisposed of at this time. This may require vacating the orders of the Johnson Circuit Court entered on May 18, 1990 and February 15, 1990, and the entry of new orders after relief from stay is obtained. There appears to be no other clear way to reach a binding decision as to the rights of the parties to this controversy.

The objection of Sherry Minix to the amended schedules filed by debtor is overruled.

Dated: August 7, 1991.

By the court -

/s/ Joe Lee
Joe Lee, Chief Judge

Copies to:

C. B. Reynolds
Joe Rosenbaum
U.S. Trustee
J. James Rogan